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No. 03-944

IN THE

Supreme Court of the United States

AMERICAN GEM SEAFOODS, INC.
and MCMI FOOD COMPANY, INC.,

Petitioners,

v.

WEI ZHANG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

Punitive Damages

Respondent Wei Zhang opposes Petitioners' constitutional challenge to the punitive damage award primarily on waiver grounds. Although Respondent does not mention it, the Ninth Circuit correctly ruled, relying on this Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001)), that Petitioner's challenge was not waived. The Ninth Circuit then recognized its duty to undertake *de-novo* review of the constitutionality of the size of the award, but failed to undertake the exacting review required by *State Farm Mutual Automobile Insurance Company v. Campbell*, 123 S. Ct. 1513 (2003). Instead, the Ninth Circuit ignored this Court's commands in *Campbell.*

Emotional Distress Damages

Respondent also asserts that Petitioners failed to preserve any objection to the sufficiency of the evidence supporting the emotional distress damage award. This also is incorrect. The issue was not waived; rather, it was preserved, briefed by both parties, further briefed by both parties at the request of the Ninth Circuit, and then addressed on its merits by the Ninth Circuit. Moreover, as Respondent concedes, Petitioners raised the issue of excessiveness of the emotional distress damages in their post-trial motion for a new trial, and the Ninth Circuit reviewed the district court's denial of that motion for abuse of discretion. A district court necessarily abuses its discretion if it applies an erroneous legal standard, and that is what Petitioner contends happened here.

In any event, Petitioners were not required to raise this point until they petitioned for *en banc* review because the Ninth Circuit had previously rejected their argument in an earlier case. Only an *en banc* court could overrule that precedent. Petitioners raised the issue in their petition for rehearing *en banc*, which was denied. That was all they needed to do.

Review will allow this Court to resolve the deepening circuit split on the proper standard for awarding emotional distress damages under federal civil rights statutes. Respondent offers no serious argument to the contrary.

Finally, Respondent's lengthy interpretation of the facts, which includes numerous assertions not supported by and contrary to the record, does not affect or diminish Petitioners' legal basis for seeking *certiorari* on punitive damages: the failure of the Ninth Circuit to undertake the required *de novo* review of evidence of discrimination by corporate actors other than Harry Lees, whom the jury concluded had not discriminated against Zhang, and its failure to apply *Campbell*'s standards to the amount of the punitive damages award. It is also of no consequence to Petitioners' challenge to the Ninth Circuit standard of proof for awarding compensatory damages for emotional distress.

I. The Ninth Circuit Failed to Apply *Campbell*, Warranting Summary Reversal or Certiorari.

A. Petitioners Did Not Waive Their Constitutional Challenge to the Punitive Damage Award.

Respondent argues that Petitioners waived their objection to the Ninth Circuit's failure to undertake *de novo* review of the punitive damages awarded in this case. (Respondent's Brief in Opposition ("Opp.") at 12.) This argument is without merit. Although Respondent does not discuss it, the Ninth Circuit expressly rejected Respondent's waiver argument and specifically held that it was required to review the punitive damage award *de novo*. *Zhang v. American Gem*, 339 F.3d 1020, 1042 (9th Cir. 2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001)) (App 42a).

Moreover, Petitioners raised this issue in their appellate briefs, as Respondent acknowledges in citing the relevant pages of Petitioners' briefs. (Opp. 13.) The Ninth Circuit also specifically requested that the parties be prepared at oral argument to discuss *Campbell*, which was decided only three days before oral argument and long after all briefing was complete. The constitutionality of the punitive damage award, as well as *Campbell*, were discussed extensively at oral argument.

Petitioners again raised the issue of the constitutionality of the punitive damage award, as well as the Ninth Circuit's failure to follow *Campbell*, in their petition for rehearing *en banc* before the Ninth Circuit. Respondent opposed the petition and argued in favor of the constitutionality of the award. The Ninth Circuit denied the petition. Respondent's

assertion that Petitioners have made these arguments "for the first time in this Court" (Opp. 15) is, thus, wholly lacking in support.

B. The Ninth Circuit's Failure to Apply *Campbell* Should Be Reviewed.

Respondent wrongly dismisses Petitioners' petition as merely a complaint regarding the application of *Campbell* to the facts. Petitioners' argument is not that *Campbell* was misapplied. It is that the Ninth Circuit failed to apply *Campbell* at all.

The Ninth Circuit failed even to mention the factors set forth in *Campbell* for evaluating the degree of reprehensibility of a defendant's conduct. 123 S. Ct. at 1521. The Ninth Circuit also ignored the new guidance *Campbell* provides regarding the ratio of punitive damages to compensatory damages, namely, that in cases with "substantial" compensatory damages, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee." *Id.* The Ninth Circuit also ignored *Campbell's* admonition that a four to one ratio "might be close to the line of constitutional impropriety." *Id.* at 1524. The Ninth Circuit disregarded these instructions as well as *Campbell's* warning against punishing defendants more than once for the same conduct by awarding overlapping emotional distress and punitive damages. *Id.* at 1525. It also ignored *Campbell's* admonition that defendants not be punished for conduct unrelated to the basis for liability. *Id.* at 1523.

Because the Ninth Circuit failed to undertake a *de novo* review of the constitutionality of the punitive damage award, *certiorari* should be granted, either to summarily vacate and remand for consideration of *Campbell*, or to grant full review. If the Ninth Circuit's approach is allowed to stand, it will render *Campbell* a nullity.

II. The Conflict in the Circuit Courts Regarding Emotional Distress Damages Should be Resolved.

A. Petitioners Did Not Waive Their Challenge to the Circuit Split Regarding the Standard of Proof for Emotional Distress Damages.

Respondent's argument that Petitioners did not preserve the issue of emotional distress damages is unavailing. As Respondent concedes, this issue was raised in Petitioners' motion for a new trial. (Opp. 18-19.) The Ninth Circuit *sua sponte* requested additional briefing regarding the compensatory damage award before oral argument. It reviewed whether the compensatory damages awarded for emotional distress were excessive, and, applying its minority rule, concluded that Zhang's testimony was sufficient to support the emotional distress award. 339 F.3d at 1041 (App. 37a-39a). The Ninth Circuit did not rule that Petitioner's challenge to the legal standard was waived – even while holding that other issues were. 339 F.3d at 1039-40 (App. 20a).

While admitting that Petitioners preserved this issue in their new trial motion, Respondents argue that abuse of discretion review prevents this Court from addressing Petitioners' argument on the proper standard for emotional distress damages. (Opp. 18-19.) That is wrong. "A district

court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). Thus, review for abuse of discretion necessarily involves review of the law on which the district court based its decision, and Petitioners contend that the wrong law was applied.

Respondent also asserts that Petitioners' failure to object to the jury instruction constitutes a waiver. But that, too, is wrong. Petitioners' argument does not involve instructional error. Rather, it is a request that the proper legal standard, requiring demonstrable evidence of emotional distress, be applied here.

Furthermore, even if Respondents are correct, and Petitioners failed to preserve this issue in the district court, there is no dispute that Petitioners sought to have this issue reviewed by the *en banc* Ninth Circuit. Raising this issue on a sufficiency challenge or objection to a jury instruction in the district court would have been futile, as precedent in the Ninth Circuit was clear, if wrong. 339 F.3d at 1040 (App. 37a-38a). Petitioners raised this challenge in the most procedurally appropriate manner and pressed it strenuously before the *en banc* court, which is the only court that could overrule the earlier binding Ninth Circuit precedent. Imposing on litigants the burden of making empty gestures destined to fail is a waste of courts' and litigants' resources that this Court should not require.

B. The Conflict In the Circuit Courts Regarding the Standard of Proof for Emotional Distress Damages Should Be Reviewed.

The Ninth Circuit acknowledged that its rule regarding proof of emotional distress sufficient to support a compensatory damage award is substantially less stringent than the rule applied in the Fourth Circuit. *Zhang*, 339 F.3d at 1040 (App. 37a-38a). Unlike the Fourth Circuit, the Ninth Circuit does not require that evidence of emotional distress be "'demonstrable, genuine, and adequately explained.'" *Id.* (*quoting Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996)). As Respondent concedes, the Fourth Circuit requires "objective evidence" to support a claim for emotional distress damages. (Opp. 21.) The Ninth Circuit does not. 339 F.3d at 1040 (App. 37a-38a).

In arguing the conflict "is more semantic than real," Respondent misapprehends the difference between substantiated testimony regarding a plaintiff's emotional distress and testimony that is simply conclusory. (Opp. 19.) While the plaintiff's testimony alone may sometimes be sufficient to support a finding of emotional distress, the majority of circuits require that the injured party "reasonably and sufficiently explain the circumstances of the injury and not resort to mere conclusory statements." *Price*, 93 F.3d at 1251; *Patrolmen's Benevolent Ass'n of the City of N.Y. v. N.Y.*, 310 F.3d 43, 162 (2d Cir. 2002) ("A plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional distress damages.").

Dennis v. Columbia Colleton Medical Center, Inc., 290 F.3d 639, 653 (4th Cir. 2002), is illustrative. In *Dennis*, the Fourth Circuit ruled that the plaintiff's conclusory statements that she was "devastated" and "humiliated" by the discrimination were not sufficient to support emotional distress damages. The statements in *Dennis* resemble closely the testimony given by Respondent in the district court.

Review in this case would remedy a deepening circuit split in which the Ninth and Eleventh Circuits stand alone in allowing the barest of evidence to support substantial emotional distress awards. This issue is of heightened importance in light of *Campbell*, which recognizes that emotional distress damages awarded for hurt and humiliation present risks of duplicative and unconstitutional punishment. 123 S. Ct. at 1525. It follows that an impermissible emotional distress award may often yield an unconstitutional punitive damages award under *Campbell*'s framework. If compensatory damages are inflated by an impermissible emotional distress award, a punitive damages award may be unconstitutionally high – even though the ratio might not cause a court to "raise a suspicious judicial eyebrow." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583 (1996).

CONCLUSION

For all these reasons and the rea asons set forth in the petition for a writ of *certiorari*, Petiti ioners request that the Court grant *certiorari*.

Res spectfully submitted,

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